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In the Supreme Court of the United States

OCTOBER TERM, 1980

ANNE B. ZIPES, ET AL., PETITIONERS

v.

TRANS WORLD AIRLINES, INC.

INTERNATIONAL FEDERATION OF FLIGHT ATTENDANTS, PETITIONER

v.

TRANS WORLD AIRLINES, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether the charge-filing limitation period of Section 706 of the Civil Rights Act of 1964 is subject to equitable modification.

2. Whether, in the circumstances of this case, the district court had jurisdiction to approve a settlement granting relief to all members of the plaintiff class.

3. Whether a district court may approve a Title VII class action settlement between the defendant-employer and the plaintiff class which provides, among other things, for the restoration of seniority, when a union representing the incumbent employees has intervened at the time of settlement to argue that the seniority provision will adversely affect incumbents.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission is charged with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) 2000e *et seq.* The Department of Justice also has important enforcement responsibilities under Title VII. In No. 78-1545, the question presented for review is whether the charge-filing period of Section 706(d) of Title VII is an ordinary limitations period subject to equitable modification. In No. 80-951, certain questions are presented concerning the restoration of seniority in connection with a court-approved settlement of a Title VII class action pursuant to an agreement reached by the plaintiffs and the defendant-employer, when the union

representing incumbent employees is not a party, but intervenes to object. These questions are of great practical importance to the proper enforcement of Title VII.

STATEMENT

1. TWA's practice before 1970 was to require the resignation, or transfer to a ground position, of any flight attendant who became a mother through birth or adoption (Pet. App. A3).[1] In June 1970, ALSSA, which was then the bargaining representative for TWA flight attendants, challenged the lawfulness of this policy under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (1970 ed.) 2000e *et seq.*, by filing a charge with the Commission (I J.A. 27a). On August 18, 1970, after the Commission had issued a right-to-sue letter, ALSSA brought this class action in the United States District Court for the Northern District of Illinois, on behalf of all TWA flight attendants who had been affected by the policy since the effective date of Title VII (I J.A. 4a-8a). In its answer, TWA admitted jurisdiction and asserted no untimeliness defense with respect to those class members who had been terminated more than 90 days (see Section 706(d) of Title VII, 42 U.S.C. (1970 ed.) 2000e-5 (d)) before the filing of ALSSA's charge (I J.A. 8a-12a). Thereafter, in October 1970, ALSSA and TWA agreed in collective bargaining to discontinue this policy, leaving for litigation only the claims of persons who had been affected by it.

In 1971, ALSSA and TWA agreed to settle this litigation. The agreement provided that class members would be rehired without back pay, and with only the amount of union or "competitive" seniority held at discharge (I J.A. 17a-26a).[2] A settlement hearing was held, at which time counsel for TWA expressly waived any possible

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[1] "Pet. App." refers to the appendix to the petition in No. 78-1545. "IFFA Pet. App." refers to the appendix to the petition in No. 80-951. "I J.A." and "II J.A." refer, respectively, to volumes one and two of the joint appendix filed in this Court.

[2] ALSSA had not specifically sought restoration of seniority or reinstatement in its prayer for relief (I J.A. 7a-8a).

limitations defense (Pet. App. A28). The settlement was approved by the court over objections lodged by certain individual class members, including those who are now petitioners in No. 78-1545. The court of appeals set aside the settlement on the ground that ALSSA was not an adequate class representative because it owed conflicting duties, with respect to matters of reinstatement and retroactive seniority, to the class members and incumbents. This Court denied certiorari. See *Airline Stewards & Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), cert. denied, 416 U.S. 993 (1974).

2. On remand, petitioners in No. 78-1545 were appointed as class representatives to replace ALSSA, and this action was consolidated with similar suits against American Airlines.[3] In September 1974, TWA moved to amend its answer to assert, as an affirmative defense, that "[p]laintiffs and members of the class failed to file charges with the Equal Employment Opportunity Commission within 180 days after the alleged unlawful employment practices occurred with the result that their claims are barred by the statute of limitations under Section 706(e) of Title VII" (I J.A. 89a).[4] The court granted TWA's motion, but stated: "[TWA's] delay in pleading the defense of limitations may well ultimately constitute a waiver of the defense; at this juncture, however, the Court is not convinced to a legal certainty that pleading of the defense shall not be allowed" (Pet. App. A27).

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[3] In July 1974, the plaintiff class filed a second Title VII lawsuit against TWA and ALSSA, in which it was alleged that ALSSA and TWA had agreed during the pendency of the settlement appeal to reemploy only those class members who disassociated themselves from the appeal (I J.A. 79a-87a).

[4] Before 1972, Title VII provided that charges were to be filed with the Commission within 90 days of the occurrence of an alleged unlawful employment practice. See Section 706(d) of Title VII, 42 U.S.C. (1970 ed.) 2000e-5(d). When Title VII was amended in 1972, the period was extended to 180 days. See Pub. L. No. 92-261, 86 Stat. 105 (42 U.S.C. 2000e-5(e)).

3. On October 15, 1976, the district court denied (I J.A. 130a-132a) the airlines' December 1975 motion (*id.* at 102a) to exclude, for lack of subject matter jurisdiction, those class members who had been terminated more than 90 days before the filing of the charge. Although the district court adopted the airlines' argument that the charge-filing time limit was jurisdictional in nature, the court held that the claims of all class members were timely because the airlines' continued adherence to their "no motherhood" policies, until October 1970, precluded the reemployment of all flight attendants who had become mothers, and therefore constituted a violation that continued until after the charge had been filed (*id.* at 126 n.1, 132a). Thereafter, on October 18, 1976, the court entered summary judgment against TWA on the issue of liability (*id.* at 133a-134a). Finding no disputed questions of material fact, the court held (*id.* at 134a) that "TWA's 'no motherhood' policy * * * violat[ed] * * * § 703(a) of the Civil Rights Act, 42 U.S.C. § 2000e-2 (a)."[5] On December 16, 1976, the district court amended the foregoing "orders * * * granting summary judgment * * * and * * * denying * * * [the] motion to exclude * * * by adding * * * to each order: This court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" (I J.A. 135a).

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[5] In granting summary judgment on the issue of liability, the court relied on an earlier opinion (I J.A. 126a-129a) in which the court had held that American's "no motherhood" policy violated Title VII because "female parents as a class have been subjected to employment impediments to which male parents have not been subjected" (*id.* at 127a). Based on the extensive evidentiary materials submitted by the parties, the district court concluded that "the issues in this case are controlled by the court's previous opinion and the authority cited therein" (*id.* at 133a).

Thereafter, on February 3, 1977, the court of appeals granted leave to appeal under 28 U.S.C. 1292(b).[6] On August 24, 1978, the court of appeals entered its opinion, which affirmed the district court's granting of summary judgment on the issue of TWA's liability, but rejected the district court's "continuing violation" theory. The court of appeals then held that compliance with the 90-day filing period was a jurisdictional prerequisite that was not subject to equitable modification, and the court therefore found untimely the claims of those class members who had been permanently discharged more than 90 days before the charge was filed (Pet. App. A1-A17). Petitions for rehearing and for modification were denied (*id.* at A19-A20).

4. In April 1979, separate petitions for a writ of certiorari were filed by the class representatives (No. 78-1545) and TWA (No. 78-1549). On motion of the parties, the court of appeals stayed its mandate under Fed. R. App. P. 41(b), and this Court deferred consideration of the petitions pending settlement discussions. A tentative agreement was reached in June 1979. The agreement provided that the class would be divided into Subclasses "A" and "B." The members of Subclass A—women who were terminated or became mothers either within the 90 days preceding the filing of the charge or thereafter, as well as women who were reinstated in ground positions during those periods—were to receive a pro rata share of $1.5 million; an identical sum was to be divided among the members of Subclass B, a larger group consisting of women who had been discharged, or who had become mothers, more than 90 days before the filing of the charge (IFFA Pet. App. 24a-26a). Reemployment with full "benefit" (company) seniority was guar-

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[6] The docket does not reflect the entry of any stay pending appeal. See 29 U.S.C. 1292(b). While this appeal was pending, the district court approved a settlement, over union objection, in the companion suit against American. The court of appeals affirmed, and this Court denied certiorari. See *Airline Stewards & Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960 (7th Cir.), cert. denied, 439 U.S. 876 (1978).

anteed to the members of both subclasses, subject to the existence of vacancies and the ability of the individuals to meet TWA employment standards and other settlement terms (*id.* at 29a-32a). The agreement also originally provided that each class member would receive full "competitive" (union) seniority unless an interested third party objected, in which case the district court would determine whether to grant seniority beyond that held at discharge (*id.* at 29a-30a).

IFFA, which had become the bargaining representative for TWA flight attendants in 1977, intervened in July 1979, after the settlement was presented to the district court for approval under Fed. R. Civ. P. 23(e). IFFA objected to the settlement terms on the ground that they would adversely affect incumbents; IFFA also challenged the court's jurisdiction to approve the settlement as well as its authority to restore seniority (II J.A. 11-14). After IFFA had intervened, the settlement agreement was modified to authorize the district court to determine the amount of union seniority that should be restored (IFFA Pet. App. 21a).

The district court ruled on IFFA's jurisdictional objections on September 14, 1979 (IFFA Pet. App. 13a-15a). Given the action of the court of appeals in staying its mandate pending this Court's consideration of the parties' petitions for a writ of certiorari, the district court concluded that it retained authority to act on the proposed settlement, notwithstanding the opinion of the court of appeals concerning the untimeliness of the Subclass B claims. The district court reasoned that "the parties to the controversy are free to settle their differences prior to the issuance of the mandate," and that they should not be "forced against their will to continue a legal battle before the Supreme Court in a winner-take-all contest which neither party desires to risk" (*id.* at 15a).

Thereafter, the district court conducted hearings and received voluminous documentary evidence concerning the fairness and adequacy of the settlement (see, *e.g.*, II

J.A. 22-211). Among other things, the evidence showed that approximately 33 members of Subclass A and 172 members of Subclass B were expected to seek reemployment, whereas TWA's complement of flight attendants numbered approximately 7,000 (*id.* at 87, 137-138). On November 8, 1979, the district court entered an order finding that the settlement was "fair, reasonable and adequate for the parties and Subclasses A and B" (IFFA Pet. App. 16a-17a). The court also dismissed the underlying action, but retained jurisdiction to determine the question of union seniority, to enforce the settlement, and to determine attorneys' fees and costs (*ibid.*). On the same date, the district court entered a second order which restored to each class member currently employed by TWA, or to be reemployed under the agreement, the full union seniority that she would have had but for her discharge. Based on the evidence before it, the court found that "full restoration of retroactive seniority will not have an unusual adverse impact upon currently employed flight attendants in a manner which is not typical of other Title VII cases" (*id.* at 18a-19a).

5. IFFA appealed, and the court of appeals affirmed the judgment of the district court (IFFA Pet. App. 1a-10a). The court of appeals rejected IFFA's contention that the district court lacked jurisdiction, because of its own previous decision, to approve a settlement granting any benefit to members of Subclass B. Relying on its decision in *Airline Stewards & Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960 (7th Cir.), cert. denied, 439 U.S. 876 (1978) (see note 6, page 5, *supra*), the court noted that the union's objections were to be evaluated in light of legal principles applicable to judicial review of settlements, and the district court was not required to decide the merits of the controversy that was being compromised (IFFA Pet. App. 5a-6a). In this case, the court of appeals noted (*id.* at 7a):

> There is a crucial issue, that of jurisdiction as to Subclass B, which has not been finally determined because a challenge to our decision is still pending

> before the United States Supreme Court. Both parties to the settlement believed it in their interests to approve the settlement rather than await the action of the Supreme Court. Not only does their compromise reflect their perception that the ultimate resolution of this issue could not be predicted with certainty, but prior case law also left the law on this matter open to question.

Given these circumstances, together with the district court's unquestionable jurisdiction over the Subclass A claims, the court of appeals concluded that the district court had jurisdiction to rule on the settlement because "parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement that is otherwise appropriate for district court approval" (*id.* at 9a).

The court of appeals further held that the district court had not abused its discretion in approving the settlement agreement or in restoring seniority. The district court had properly considered the fairness, reasonableness, and adequacy of the settlement as to the class, as well as its effects upon the public and other parties, such as IFFA, and the agreement provided substantial awards to class members, thus serving the statutory policy of remedying past acts of discrimination (IFFA Pet. App. 9a-10a). Moreover, the reinstatement provision would not displace any incumbent employee; reinstatement would be accomplished through normal attrition in less than six months (*id.* at 10a). Finally, the court of appeals noted that the district court had determined that restoration of full union seniority would have no unusual adverse impact on incumbents (*ibid.*).

A petition for rehearing was denied on September 17, 1980 (IFFA Pet. App. 11a), and IFFA filed a petition for a writ of certiorari (No. 80-951) on December 12, 1980.

SUMMARY OF ARGUMENT

IFFA mounts a two-pronged attack on the settlement that the district court approved in this 11-year-old litigation between TWA and the members of the plaintiff

class, who were deprived of their employment because of TWA's "no motherhood" policy. First, IFFA contends that the district court lacked jurisdiction to approve the settlement with respect to the claims of the members of Subclass B because the court of appeals had held, prior to the time that the settlement was approved, that the Subclass B claims were jurisdictionally infirm. Second, IFFA contends that the district court should not have approved the settlement, which included restoration of seniority, because IFFA did not consent, and, in its view, seniority may never be restored in a Title VII settlement without union consent. There is no merit to either of these contentions.

First, IFFA's jurisdictional claim rests on the fact that, prior to the district court's approval of this settlement, the court of appeals had held that the district court lacked jurisdiction over the Subclass B claims for the reason that the members of Subclass B had not filed charges with the Commission within 90 days of their discharges, in compliance with Section 706(d) of Title VII, 42 U.S.C. (1970 ed.) 2000e-5(d). The court of appeals based its holding on the ground that this time limitation was "jurisdictional" and not subject to equitable modification. Whether the holding of the court of appeals is correct is the question presented in No. 78-1545. As we shall show, this holding is inconsistent with the language, legislative history, and statutory policy of Title VII, as well as with the settled principle that statutory limitations periods should be construed, in the absence of contrary legislative intent, as ordinary statutes of limitation subject to equitable modification. Because the holding of the court of appeals was erroneous, the district court had jurisdiction. However, even if this Court should now hold that the charge-filing period is jurisdictional, there is ample ground for concluding that the district court had the authority to approve the settlement in the peculiar circumstances of this case.

Second, there is no merit to IFFA's contention that seniority may never be restored in a settlement without

the consent of a nonparty union representing incumbent employees. If IFFA were correct, a nonparty union would have a virtual veto over a settlement—a veto which it seldom, if ever, could be expected to refrain from exercising, at least in circumstances such as those presented here. IFFA's position is thus incompatible with Title VII's statutory policy of securing relief through voluntary means where possible, and it would seriously impede the statutory goal of "making whole" victims of discrimination. Although the seniority interests of incumbents are important, such interests are afforded adequate protection where, as here, the incumbents have an opportunity to object and present evidence on the fairness of the settlement. It is too much to ask that they also be allowed to rule on the merits of their own objections.

ARGUMENT

I. THE TITLE VII CHARGE-FILING PERIOD IS AN ORDINARY STATUTE OF LIMITATIONS SUBJECT TO EQUITABLE MODIFICATION

In 1978, the court of appeals held that the district court lacked subject matter jurisdiction over the Subclass B claims because compliance with the charge-filing time period was a "jurisdictional" requirement that was not subject to waiver[7] or other equitable modification (Pet. App. A15). This holding, which is inconsistent with the current law of every other circuit that has decided the issue,[8] is plainly incorrect. The language, legis-

[7] The court of appeals noted (Pet. App. A15) that, "[t]here is no dispute that [TWA] failed to raise [the timeliness] issue in the pleadings."

[8] The Fifth Circuit has recently noted that some confusion exists in the case law because "the jurisdictional label has often been used loosely, and sometimes interchanged in the same opinion with statute of limitations terminology." *Coke* v. *General Adjustment Bureau, Inc.*, 640 F.2d 584, 591 (1981) (en banc). Accord, *Reynolds* v. *Sheet Metal Workers, Local 102*, No. 80-1378 (D.C. Cir. Mar. 31, 1981), slip op. 6; *Hart* v. *J.T. Baker Chemical Corp.*, 598 F.2d 829, 832-833 (3d Cir. 1979). See also *Reeb* v. *Economic*

lative history, and statutory policy of Title VII not only fail to support the view that the charge-filing period is "jurisdictional," but affirmatively demonstrate that it is an ordinary statute of limitations subject to equitable modification. The decision below is also inconsistent with the well-established principle that, absent contrary evidence of legislative intent, statutory limitations periods are generally to be construed as ordinary statutes of limitations subject to equitable modification.

1. This Court has long recognized that federal courts ordinarily have the equitable power to excuse compliance, in appropriate circumstances, with time periods pre-

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Opportunity Atlanta, Inc., 516 F.2d 924, 927-928 (5th Cir. 1975) (Wisdom, J.). After thoroughly surveying the case law, the Fifth Circuit has concluded, however, that the Seventh Circuit currently stands alone in holding that timely compliance with the charge-filing provision is "jurisdictional" in the sense that compliance vel non determines the jurisdiction of the district court, without regard to equitable modification based on the circumstances of a particular case. *Coke* v. *General Adjustment Bureau, Inc.*, *supra*, 640 F.2d at 589.

Six courts of appeals have held that the charge-filing period is subject to equitable modification. See *Hart* v. *J.T. Baker Chemical Corp.*, 589 F.2d 829, 832-833 (3d Cir. 1979); *Oazaca* v. *Roscoe*, 641 F.2d 386 (5th Cir. 1981); *Leake* v. *University of Cincinnati*, 605 F.2d 255, 259 (6th Cir. 1979); *Cooper* v. *Bell*, 628 F.2d 1208, 1212-1214 (9th Cir. 1980); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779, 781 (9th Cir. 1972); *Sanchez* v. *Trans World Airlines, Inc.*, 499 F.2d 1107, 1108 (10th Cir. 1974); *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 474 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978).

The Fourth Circuit has not considered the issue with respect to the charge-filing period, but it has held that the suit-filing limitation period (Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1)) is subject to equitable modification. *Stebbins* v. *Nationwide Mutual Insurance Co.*, 469 F.2d 268, 269 (1972), cert. denied, 410 U.S. 939 (1973). The First and Second Circuits have left the question open. *Daughtry* v. *King's Dep't Stores, Inc.*, 608 F.2d 906, 909 (1st Cir. 1979); *Smith* v. *American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978). In *Satz* v. *ITT Financial Corp.*, 619 F.2d 738, 745 n.11 (1980), the Eighth Circuit noted that, "Congress appears to have regarded the time period as a statute of limitations."

scribed by statute. *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 558-559 (1974); *Burnett* v. *New York Central R.R.*, 380 U.S. 424 (1965); cf. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946); *Herb* v. *Pitcairn*, 325 U.S. 77 (1945).[9] Indeed, the principle is so deeply embedded in our jurisprudence that it must be assumed to apply to a particular limitations period absent some contrary indication of legislative intent. *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231, 234-235 (1959). The court below did not bring these principles to bear upon its analysis (see Pet. App. A15-A17), but held that equitable modification was unavailable because the charge-filing requirement is "jurisdictional." There is no basis for that conclusion.

Whether a court has subject matter jurisdiction "is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case." *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979). Thus, as Justice Holmes said for the Court, "Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought." *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). Here, jurisdiction rests on Section 706(f)(3) of Title VII, 42 U.S.C. 2000e-5(f)(3), which provides in part

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[9] Despite the general availability of equitable modification in appropriate circumstances, statutes of limitations are not easily avoided. Because a limitations provision represents "the balance struck by Congress" between the plaintiff's right to enforce his claim and the defendant's right to be free from having to defend against stale claims, a court is "not free to construe it so as to defeat its obvious purpose * * * [of] encourag[ing] the prompt presentation of claims." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). See also *Order of R.R. Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349 (1944). Principles of waiver, estoppel and tolling will be invoked successfully only when the "congressional purpose is effectuated" by doing so "in given circumstances." *Burnett* v. *New York Central R.R.*, *supra*, 380 U.S. at 427. Because these principles serve the ends of substantial justice, however, they are presumed to be compatible with legislative intent, absent clear evidence to the contrary.

that "[e]ach United States district court * * * shall have jurisdiction of actions brought under this subchapter." This section also makes provision, at some length, for determining where venue will lie in a Title VII action (*ibid.*). It must be emphasized, however, that Section 706(f)(3) is separate and distinct from the charge-filing section, that it contains no reference to the charge-filing requirement, and that it certainly does not purport to limit the jurisdiction of the federal courts to cases in which the plaintiff has complied with the charge-filing period. Neither does the charge-filing section purport to condition the jurisdiction of the federal courts upon compliance with this requirement. See Section 706(d) of Title VII, 42 U.S.C. (1970 ed.) 2000e-5(d); Section 706(e) of Title VII, 42 U.S.C. 2000e-5(e). The two sections plainly deal with different subject matters and serve different purposes. While the one deals with the jurisdiction of the federal courts, the other deals with proceedings before the Commission. Neither the court below nor IFFA has produced any evidence to show that Congress intended to merge the charge-filing time requirement into the jurisdictional provision. Moreover, if that had been Congress' intention, it could easily have been accomplished.[10]

2. The legislative history, although sparse on this point, also strongly suggests that Congress intended the charge-filing period to be an ordinary statute of limitations. For many years before the enactment of Title VII, proponents of fair employment legislation had looked to the provisions of the National Labor Relations Act as a model (see 110 Cong. Rec. 7266-7267 (1964) (re-

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[10] Compliance with the charge-filing requirement is therefore relevant, not to the court's jurisdiction to hear the case, but to the question whether a particular plaintiff has an enforceable cause of action, that is, whether he "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Davis* v. *Passman*, *supra*, 442 U.S. at 240 n.18. See also *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977). Moreover, the existence of a cause of action is a determination "of law * * *

marks of Sen. Ellender)),[11] and Congress borrowed liberally from that Act when it drafted Title VII in 1964. For example, it modeled the relief provisions of Title VII (Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g)) after Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c). See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 768-770 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 & n.11, 420 & n.12 (1975). Likewise, it is clear that Congress modeled the charge-filing provision of Title VII after Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b).

The language of the two provisions is strikingly similar. Section 10(b) provides that "no complaint shall issue upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *" (29 U.S.C. 160(b)). Section 706(d) of Title VII provided that "[a] charge * * * shall be filed within ninety days after the alleged unlawful employment practice occurred" (42 U.S.C. (1970 ed.) 2000e-5(d)). In addition to similar language, the two provisions have a common purpose: "to set in motion the machinery of an inquiry." *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 307 (1959). Compare *EEOC* v. *General Electric*, 532 F.2d 359, 369 (4th Cir. 1976); *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970). See

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decided after and not before a court has assumed jurisdiction over the controversy." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946).

Indeed, this Court has explicitly rejected the contention that where the same statute both creates a cause of action and establishes a limitation upon the time within which the cause of action may be brought, " 'the time limitation is an integral part of [the] new cause of action . . . that * * * is irretrievably lost at the end of the statutory period.' " *American Pipe & Construction Co.* v. *Utah*, *supra*, 414 U.S. at 559, quoting *Glus* v. *Brooklyn Eastern Terminal*, *supra*, 359 U.S. at 232. See also *Burnett* v. *New York Central R.R.*, *supra*, 380 U.S. at 427 n.2.

[11] See also EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, at 2-3, 7-9 (1964); Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431 & n.2 (1966).

also 110 Cong. Rec. 14191 (1964) (remarks of Sen. Keating) ("The filing of a charge merely brings a matter to the attention of the Commission"). Similarly, it is the agency's investigation and determination, not the charge, that ultimately defines the alleged violation under both statutes. See *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 372-373 n.32 (1977).

Given these parallels, it is certainly significant that the charge-filing provision of Section 10(b) had been construed as a statute of limitations subject to equitable modification when Congress used it as a model for Title VII in 1964. See *NLRB* v. *A.E. Nettleton Co.*, 241 F.2d 130, 133 (2d Cir. 1957); *NLRB* v. *Clausen*, 188 F.2d 439, 443 (3d Cir. 1951); *NLRB* v. *Itasca Cotton Mfg. Co.*, 179 F.2d 504, 505-507 (5th Cir. 1950). See also *Machinists Lodge No. 1424* v. *NLRB*, 362 U.S. 411 (1960).[12] In these circumstances, it is fair to assume that Congress was aware of this construction and intended it to apply to Title VII as well. Cf. *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 133 (1943).

Although Congress did not extensively discuss the charge-filing provision in 1964, the remarks of the bill's sponsors support the view that this provision was intended to serve as a statute of limitations. Before the Senate floor debate on the House bill, Senator Case explained the House version of this provision in traditional statute of limitations terms: "to avoid the pressing of 'stale' claims, the title provides that no suit may be brought with respect to any practice occurring more than 6 months prior to the filing of a charge with the Com-

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[12] The courts have continued to construe the charge-filing provision of Section 10(b) as a statute of limitations subject to equitable modification. See *NLRB* v. *Local 264, Laborers' International Union*, 529 F.2d 778, 784-785 (8th Cir. 1976); *Shumate* v. *NLRB*, 452 F.2d 717, 720-721 (4th Cir. 1971); *A.H. Belo Corp.* v. *NLRB*, 411 F.2d 959, 966-967 (5th Cir. 1969), cert. denied, 396 U.S. 1007 (1970); *Chicago Roll Forming Corp.*, 167 N.L.R.B. 961, 971 (1967), enforced, 418 F.2d 346 (7th Cir. 1969).

mission." 110 Cong. Rec. 7243 (1964).[13] Following the Senate debate, which had resulted in the drafting of a substitute bill that was later enacted without change, Senator Humphrey referred to the 90-day period established in the substitute bill as a "period of limitations" (*id.* at 12723). These comments suggest that Congress intended the charge-filing period to be viewed as an ordinary statute of limitations;[14] they do not suggest

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[13] Moreover, in introducing the House version, Senator Humphrey had stated that the "suit against the respondent * * * brought by * * * the complaining party, would proceed in the usual manner for litigation in the Federal courts." 110 Cong. Rec. 6549 (1964).

[14] In *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 820 (1980), the Court reviewed the legislative history, noting that "it seems clear that the 90-day provision to some must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." Accord, *Delaware State College* v. *Ricks*, No. 79-939 (Dec. 15, 1980), slip op. 6. The Court's observation is consistent with the view that the 90-day period is a statute of limitations subject to customary principles of equitable modification. See, *e.g.*, *American Pipe & Construction Co.* v. *Utah*, *supra*, 414 U.S. at 556-559; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 325-333 (1971); *Sanger* v. *Nightingale*, 122 U.S. 176, 183 (1887). The holding in *Mohasco Corp.* is not to the contrary in that the Court there merely struck down an administrative interpretation that would have extended the filing period for all charging parties, without regard to the equities of a particular case. Moreover, although the Court observed in *Mohasco Corp.* that the plaintiff had also failed to comply with the analogous suit-filing time period (Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1)), the Court noted that the defendant had not asserted this failure as a defense, and therefore treated it as waived (447 U.S. at 811 & n.9). The Court thus implicitly held that the suit-filing period was not "jurisdictional" (see *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 382 (1884)), and there is no good ground for distinguishing the two limitations periods for this purpose. Likewise, in *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976), the Court held that the pursuit of grievance procedures would not toll the running of the limitations period, but the Court did not do so on the ground that the period

that Congress intended to condition the existence of a cause of action under Title VII upon absolute compliance with the charge-filing period.[15]

The legislative history of the 1972 amendments, which enlarged the charge-filing period from 90 to 180 days, demonstrates even more clearly that Congress viewed the

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was "jurisdictional," and its careful consideration of the various arguments in favor of tolling strongly suggests that it did not view the limitations period as immune from equitable modification. See *Coke* v. *General Adjustment Bureau, Inc.*, *supra*, 640 F.2d at 587-589; *Hart* v. *J.T. Baker Chemical Co.*, *supra*, 598 F.2d at 833; *Smith* v. *American President Lines, Ltd.*, *supra*, 571 F.2d at 108-109. See also *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977) (upholding intervention by putative class member who had not filed Title VII charge). Like the courts of appeals (see pages 9-10, note 8, *supra*), this Court has sometimes referred to the charge-filing period as "jurisdictional" (see *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnel Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973)), where the distinction has not been material. See *Coke* v. *General Adjustment Bureau, Inc.*, *supra*, 640 F.2d at 587-589. More recently, however, the Court has referred to the charge-filing period as a "statute of limitations" or "limitations period." See *Delaware State College* v. *Ricks*, *supra*, slip op. 6; *Mohasco Corp.* v. *Silver*, *supra*, 447 U.S. at 822; *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 371-372 (1977).

[15] The only material changes in the charge-filing procedure that resulted from the Senate debate were the reduction of the filing period from six months to 90 days, and the addition of the requirement that charges be deferred to state and local agencies. The House bill contained a six-month limitations period without regard to the availability of state or local remedies. Section 707(d) of H.R. 7152, 110 Cong. Rec. 2511 (1964). The Senate substitute not only established a period in which state and local agencies would have exclusive jurisdiction (see 42 U.S.C. (1970 ed.) 2000e-5(b) and (c)), but it also provided different charge-filing limitations periods, depending upon whether state and local remedies were available. The charge-filing period in "non-deferral" jurisdictions was set at 90 days; the period for "deferral" jurisdictions was set at 210 days (see 42 U.S.C. (1970 ed.) 2000e-5(d)). The legislative history of these amendments likewise provides no suggestion that Congress intended the charge-filing limitations to be something other than an ordinary statute of limitations subject to equitable modification.

filing period as an ordinary statute of limitations. Both the House and Senate Committee reports refer to the enlarged period as either a "limitation period" or a "statute of limitations" that is "similar" or "identical" to the limitations period of the National Labor Relations Act.[16] Moreover, Congress specifically approved those decisions that had interpreted the limitations period to "give the aggrieved person the maximum benefit of the law," and it declared that the amendment's "extension of the time limitations" should not affect those interpretations. Joint section-by-section Analysis, 118 Cong. Rec. 7167, 7565 (1972). Although the 1972 legislative history cannot be dispositive of Congress' intent in 1964, of course, it is certainly entitled to significant weight, given the fact that nothing in the 1964 legislative history is inconsistent with the views that Congress expressed in 1972, and there is no reason to believe that Congress had a different intention in 1964. See *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980); *Cannon* v. *University of Chicago*, 441 U.S. 677, 686 n.7 (1979).[17]

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[16] The Senate Committee described the 180-day charge-filing period as "a limitation period similar to that contained in [the] Labor-Management Relations Act, as amended (29 U.S.C. 160(b))." S. Rep. No. 92-415, 92d Cong., 1st Sess. 37 (1971). In H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 65 (1971), the minority stated: "Statute of limitations. Under the Committee bill, the time period in which individual charges of employment discrimination must be filed has been extended from 90 days to 180 days * * *; this is identical to the statute of limitations under the National Labor Relations Act. We concur in such extension."

[17] Similarly, in 1978, when Congress amended the Age Discrimination in Employment Act, 29 U.S.C. (Supp. III) 621 *et seq.*, which contains a charge-filing requirement analogous to that involved here (see Section 7(d)(1) of the Act, 29 U.S.C. (Supp. III) 626(d)(1)), Congress specifically stated that, "the 'charge' requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and * * * therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act. See, *e.g.*, *Dartt* v. *Shell Oil Co.* (10th Cir. 1976), affirmed by an evenly divided court, [434 U.S. 99,] 98 S. Ct. 600 (1977) * * *." H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 12 (1978).

3. The holding below is also inconsistent with the statutory policy of Title VII. As we have shown (see page 12, note 9, *supra*), the law of limitations is designed to strike the proper balance between the plaintiff's interest in having decided the merits of an otherwise valid claim and the defendant's interest in not having to defend against stale claims. Generally, this balance is struck by requiring that a claim be brought within a prescribed period of time, unless there are equitable grounds for excusing compliance. Only in exceptional cases is the balance struck elsewhere. Nonetheless, the court below has construed the charge-filing period as "jurisdictional," thereby creating a more formidable barrier to relief. This departure from general principles is not only unwarranted by the language and legislative history of Title VII, but it strikes a major blow at the statutory policy.

We note first that the charge-filing period is an unusually short limitations period, and the holding below is certainly not necessary to protect defendants against "stale" claims. More important, this Court has long recognized that unnecessary technicalities have no place under Title VII, which is a "statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972).[18] Not only does enforcement of Title VII depend in the first instance upon the filing of charges by persons who are unschooled in the niceties of the law, but the statutory scheme also places substantial reliance upon such persons to vindicate the public interest in uprooting employment discrimination by bringing private actions "which remain[ ] an essential means of obtaining judicial enforcement of Title VII." *Alexander* v. *Gardner-*

[18] See *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 928 (5th Cir. 1975) (Wisdom, J.) ("It is reasonable, therefore, for courts to refuse to apply technical rules of common law pleading"); *Antonopulos* v. *Aerojet-General Corp.*, 295 F. Supp. 1390, 1395 (E.D. Cal. 1968) ("We are not dealing with businessmen-plaintiffs or plaintiffs accustomed to consulting lawyers about their rights").

Denver Co., 415 U.S. 36, 45 (1974).[19] Indeed, the private litigant has the unique role of a "private attorney general" as the "chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978), quoting *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). Accord, *EEOC* v. *Associated Dry Goods Corp.*, No. 79-1068 (Jan. 26, 1981), slip op. 11-12; *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 326 (1980).

Given the emphasis that Title VII places on the private right of action as the means for vindicating the important public interest embodied in this remedial statute, together with Congress' recognition that this enforcement scheme would depend upon the filing of charges by lay persons, without the assistance of lawyers, it is inconceivable that Congress would have intended to deprive Title VII plaintiffs of the same benefit of equitable modification that is generally available under federal law.[20]

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[19] The legislative history illustrates the important role that Congress assigned to private actions. The Senate substitute bill rejected the provision of the House bill giving the Commission the authority to bring suit, thus making private suits the primary method of obtaining judicial enforcement (110 Cong. Rec. 12721 (1964)), and it also strengthened the private right of action both by removing the requirement that private parties obtain the Commission's permission to sue (*ibid.*), and by providing for awards of attorneys' fees (*id.* at 12724). When Congress amended Title VII to authorize suits by the Commission, it nonetheless retained the private right of action because the "primary concern should be to protect the aggrieved person's option to seek a prompt remedy." S. Rep. No. 92-415, 92d Cong., 1st Sess. 24 (1971); see also section-by-section Analysis of the Equal Employment Opportunity Act of 1972, 118 Cong. Rec. 7167 (1972).

[20] The history of congressional concern for individual rights under Title VII is far more compelling than that upon which the Court relied in *American Pipe & Construction Co.* v. *Utah*, *supra*, 414 U.S. at 558 n.29, to bolster the conclusion that generally accepted tolling principles should apply in cases brought under the antitrust laws. Indeed, this Court has emphasized that the federal courts, in exercising the broad equitable powers granted by Title

Certainly, such an intent is not to be presumed absent clear evidence in the language or legislative history, which is not present here. Indeed, as we have shown, the statutory scheme and pertinent legislative history suggest the contrary.

II. THE DISTRICT COURT HAD JURISDICTION TO ENTER A SETTLEMENT WITH RESPECT TO THE CLAIMS OF ALL CLASS MEMBERS

IFFA contends (Br. 37-42) that the 1978 decision of the court of appeals (Pet. App. A1-A17), holding that the charge-filing period was "jurisdictional," deprived the district court of jurisdiction to approve the settlement insofar as it concerned the claims of Subclass B.[21] As we have shown (see pages 10-21, *supra*), however, the 1978 holding of the court of appeals was erroneous, and it is therefore clear that the district court had subject matter jurisdiction when it entered the settlement.[22] But even if this Court should agree with the 1978 holding of the court of appeals, the district court's order approving the settlement (IFFA Pet. App. 16a-17a) should nonetheless be affirmed.

VII, possess ample authority "to locate 'a just result' in light of the circumstances peculiar to the case." *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 373, quoting *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 424-425, and *Langnes* v. *Green*, 282 U.S. 531, 541 (1931). See also *Holmberg* v. *Armbrecht*, *supra*, 327 U.S. at 395.

[21] IFFA now appears (see Br. 37-42) to challenge the district court's authority to approve the settlement with respect to both subclasses. In its petition, however, IFFA conceded the court's jurisdiction to approve the settlement insofar as the Subclass A claims were concerned (IFFA Pet. 9 n.11). IFFA apparently believes that its new position is more consistent with the argument that a court may never approve a settlement that "supersedes" a collective bargaining agreement unless the union consents. See pages 24-31, *infra*.

[22] The question of compliance with the time-filing requirement is one relating to the existence of the Subclass B members' cause of action, not to the court's jurisdiction. Even if a failure to comply with the charge-filing requirement could not equitably be excused

Notwithstanding its earlier holding that the filing period was "jurisdictional," the court of appeals properly found (IFFA Pet. App. 1a-10a) that the district court had the authority, in light of all the circumstances, to approve this settlement under Fed. R. Civ. P. 23(e). The earlier decision of the court of appeals had been rendered in an appeal brought under 28 U.S.C. 1292(b), a stay of the proceedings in the district court had not been entered, the mandate of the court of appeals had been stayed, and a petition for a writ of certiorari had been filed seeking review in this Court of the "jurisdictional" holding of the court of appeals. A conflict among the circuits evidenced not only that the issue was substantial, but also that the ultimate resolution of the issue could not be predicted with certainty by either party.[23] Moreover, the jurisdiction of the district court over the action was clear because no question could be raised concerning the court's jurisdiction over the Subclass A claims.[24] In these circumstances, the court of appeals

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in any circumstances, the issue of compliance would still be a question relating to the existence of the cause of action, which goes to the merits. See *Bell* v. *Hood*, *supra*, 327 U.S. at 682. *Cf. Oaxaca* v. *Roscoe*, *supra*, 641 F.2d at 391 (Title VII time limits are not "jurisdictional," and "dismissal for failure to act timely * * * is properly raised by a Rule 12(b)(6), Fed. R. Civ. P., motion for failure to state a claim"). Moreover, under Fed. R. Civ. P. 23(e), the parties may compromise any disputed issue of fact or law going to the merits of the cause of action, and any question concerning such issues is irrelevant to determining whether the court has authority to approve the settlement, although such questions may affect the court's exercise of discretion in deciding whether to approve the settlement over the objections of affected nonparties. See pages 28-30, *infra*.

[23] Indeed, in the year preceding settlement, two courts of appeals had specifically rejected the view that the charge-filing period is "jurisdictional." See *Leake* v. *University of Cincinnati*, *supra*, 605 F.2d at 259; *Hart* v. *J.T. Baker Chemical Co.*, *supra*, 598 F.2d at 831-833.

[24] Furthermore, the settlement encompassed two separate class actions. In addition to the principal action, a second suit alleging retaliation (see I J.A. 79a-87a) was also before the court, and that

properly held (IFFA Pet. App. 8a, quoting *id.* at 15a) that the parties should not " 'be[ ] forced against their will to continue a legal battle before the Supreme Court in a winner-take-all contest which neither party desires to risk.' " [25]

The mandate of the court of appeals having been stayed, the district court was not bound by its decision. See *Bailey* v. *Henslee*, 309 F.2d 840 (8th Cir. 1962); see also *Alphin* v. *Henson*, 552 F.2d 1033 (4th Cir. 1977). Moreover, the legal effect of a stay of mandate is to maintain the status quo between the parties to the appeal. *Algonquin Gas Transmission Co.* v. *Township of Bernards*, 112 F. Supp. 86, 90 (D.N.J. 1953). Here, the status quo was determined by the district court's previous orders in which it had found both jurisdiction and liability with respect to the claims of all class members, and the district court was clearly correct in finding (IFFA Pet. App. 15a) that "[i]mplicit in the mainte-

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action was also compromised as part of the settlement (see IFFA Pet. App. 13a). The court's jurisdiction with respect to the claims of all class members in the retaliation case was never questioned.

[25] IFFA contends (Br. 43) that although the Subclass B claims could not be settled with court approval under Fed. R. Civ. P. 23(e), the members of Subclass B would nonetheless not be compelled to litigate against their will because they could settle without court approval. However, IFFA does not, and cannot, explain how such settlements could be accomplished without subverting the provisions of Rule 23(e), the purpose of which is to protect the interests of all class members in the event of dismissal or compromise. To guarantee this protection, the rule is mandatory. 3B *Moore's Federal Practice* ¶ 23.80[2.-1] (2d ed. 1980). Thus, court approval is required in any compromise of a class action reached after a decision but before entry of judgment. Cf. *id.* at ¶ 23.1.24[2]; *Winkelman* v. *General Motors Corp.*, 48 F. Supp. 490, 495 (S.D.N.Y. 1942). Clearly, the case could not be settled without court approval unless the petitions for a writ of certiorari were withdrawn, in which event the judgment of the court of appeals would become final, and the claims of all members of Subclass B would be extinguished. Thus nothing would remain to be settled, unless some additional agreement to the contrary had been reached, which likewise would have circumvented Rule 23(e).

nance of the status quo is the judicial recognition that the parties to the controversy are free to settle their differences prior to the issuance of the mandate."

Although the law favors settlements as a general matter, that preference is nowhere stronger than it is under Title VII, where "[c]ooperation and voluntary compliance were selected [by Congress] as the preferred means for achieving [its] goal." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1977). Accord, *Carson* v. *American Brands, Inc.*, No. 79-1236 (Feb. 25, 1981), slip op. 8 & n.14. In these circumstances, the district court had jurisdiction to approve the settlement.

III. A COURT MAY APPROVE A SETTLEMENT WHICH AWARDS RIGHTFUL PLACE SENIORITY TO THE PLAINTIFF CLASS WITHOUT UNION CONSENT IN CIRCUMSTANCES SUCH AS THESE

The questions presented by IFFA (Pet. i) are syntactically complex and contain numerous factual assumptions, not all of which are valid.[26] In these circumstances, we believe that the question fairly presented for review is whether, in a Title VII case, a court may approve a settlement reached by a defendant-employer and the plaintiff class, where the settlement includes the restoration of rightful place seniority, and a union representing incumbent employees, which is not a defendant, has inter-

[26] IFFA's first question (Pet. i), for instance, depends entirely upon the premise that the district court lacked subject matter jurisdiction because the charge-filing period is "jurisdictional," a premise that we have shown to be incorrect. Likewise, IFFA uses the term "finding" in a somewhat unusual manner in the second question because the courts below had found that TWA's "no motherhood" policy constituted unlawful discrimination, and the issue remaining at the time of settlement was only whether the claims of some of the plaintiff class members who suffered because of the policy were barred. Finally, IFFA characterizes the settlement as "superseding" the collective bargaining agreement, presumably because the settlement restores the class members to their "rightful place" by "slotting" them into the seniority system. However, the settlement did not "supersede," or even modify, the terms of the agreement.

vened for the purpose of arguing that such relief will unfairly affect incumbents.

IFFA contends (Br. 24-27) that a settlement may not affect seniority "rights" of incumbent employees unless it is approved by the incumbents' collective bargaining representative as well as by the court. By investing the union with such a veto power, this argument clearly gives priority to the incumbents' seniority interests over the interests that Congress sought to protect when it enacted Title VII—to "make persons whole for injuries suffered on account of unlawful employment discrimination" (*Albemarle Paper Co.* v. *Moody*, 422 U.S. 407, 418 (1975)), and to do so where possible through negotiation and voluntary settlement rather than protracted litigation. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

This Court made clear in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), that the federal courts, in fashioning a remedy for employment discrimination, may affect the seniority interests of incumbent employees. Although seniority interests are important, they may not stand in the way of effectuating the important national policy that Congress established in Title VII. As the Court said (*id.* at 778), "[c]ertainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract. This Court has long held that employee expectations arising from a seniority system may be modified by statutes furthering a strong public policy interest."

In *Franks*, of course, seniority relief was ordered only after the courts had found that the employer's practices violated Title VII.[27] IFFA gives too much emphasis to

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[27] In *Franks*, both the union-defendant and the employer were held liable because their collective bargaining agreement perpetuated past discrimination, but this Court's holding that relief could affect the seniority of incumbents did not depend on the finding of union liability. Moreover, in *Teamsters* v. *United States*, 431 U.S.

the particular facts of *Franks*, however, in suggesting (Br. 27-28) that the Court's holding there, that it would be appropriate to grant seniority relief based on a final determination of discrimination, carries the implication that such relief is not appropriate absent such a final determination. The Court's opinion in *Franks* provides no basis for drawing that inference. In *Franks*, the Court rejected the view that seniority rights are "indefeasibly vested," holding that they may be modified where they conflict with the "strong public policy interest" served by Title VII (424 U.S. at 778). There is no compelling ground for maintaining that a court, which can modify seniority rights by "slotting in" victims of discrimination after full litigation, cannot approve a settlement reasonably designed to accomplish the same result. Indeed, to hold otherwise would be to ignore Congress' intent to make voluntary conciliation and settlement "the preferred means" for resolving allegations of employment discrimination under Title VII. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 44.[28]

IFFA's contention, that a settlement may not provide for the restoration of seniority without the approval of a

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324, 348-356 (1977), this Court held that retroactive seniority relief is an appropriate remedy for discrimination by an employer even where the seniority system is bona fide and the union has not violated the Act.

[28] Accord, *Carson* v. *American Brands, Inc.*, *supra*, slip op. 8 n.14 ("In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims"); *United Airlines, Inc.* v. *McDonald*, *supra*, 432 U.S. at 401 (Powell, J., dissenting) ("Settlements particularly serve the public interest 'within the confines of Title VII where "there is a great emphasis . . . on private settlement and the elimination of unfair practices without litigation."' *Air Lines Stewards* v. *American Airlines, Inc.*, 455 F.2d 101, 109 (CA 7 1972), quoting *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 498 (CA 5 1968)"); *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement * * *. In a Title VII case, * * * the policy favoring settlement is even stronger in view of the emphasis placed upon voluntary conciliation by the Act itself").

union that is not a defendant, and thus has no potential liability (see *Northwest Airlines, Inc.* v. *Transport Workers*, No. 79-1056 (Apr. 20, 1981)), is both extravagant and flatly inconsistent with Congress' intent. Settlements are reached only when the parties to litigation recognize that their self-interests will be served by compromise. It is self-evident, however, that the interests of a union that faces no possible liability will seldom, if ever, be advanced by agreeing that seniority should be restored to victims of discrimination, who have been terminated for unlawful reasons and who may well be nonunion members,[29] because such relief will necessarily displace the rights of incumbents to some extent, however insignificantly. Unions exist, of course, to advance the interests of their members. Where, as here, a union faces no prospect of liability, and is not therefore subject to countervailing influences, the union's course of action will be dictated by its members' interests. For Title VII plaintiffs to secure seniority relief, they could be required under IFFA's theory to litigate to the bitter end even the most patently meritorious claims. Moreover, even if the proposed seniority relief would have a de minimis impact on incumbents, a union in these circumstances could still withhold agreement and force the parties to litigate to a final judgment on the merits.[30]

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[29] The union may, of course, stand in a different position with respect to employees who are union members and have suffered discrimination in terms and conditions of continuing employment, as opposed to persons who have suffered discrimination through termination or refusal to hire.

[30] Even under IFFA's theory, of course, plaintiffs and employers could settle a case if the settlement did not include the restoration of seniority. However, this Court has previously noted the critical role that seniority plays in the employment relationship, as well as its importance in providing relief from the effects of employment discrimination. See *Teamsters* v. *United States*, *supra*, 431 U.S. at 364-365; *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 766. IFFA's position, if adopted by this Court, would severely discourage plaintiffs from settling Title VII actions.

IFFA finds support (Br. 24-25) in *High* v. *Braniff Airways, Inc.*, 592 F.2d 1330 (5th Cir. 1979), for its view that settlements of this

Seniority is important, of course, to incumbents as well as to victims of discrimination.[31] However, that fact does not warrant recognition of a union veto power because the interests of incumbents are adequately protected by having the opportunity to present evidence to the settlement court, which must determine that the settlement is fair. Courts do not determine the merits of cases at settlement (*Carson* v. *American Brands, Inc.*, *supra*, slip op. 9 n.14; *Florida Trailer & Equipment Co.* v. *Deal*, 284 F.2d 567, 571-573 (5th Cir. 1960)), but a court must determine that the settlement is fundamentally fair to all parties who may be affected by it. As this Court stated in *Carson*, "[c]ourts judge the fairness of a proposed com-

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type may not be approved over union objection. The cases are not analogous, however, because the posture of the union in *High* was far different from that of IFFA here. While IFFA intervened in this case only when the parties were ready to enter into a settlement, the union in *High* was a named defendant, and thus potentially subject to liability (*id.* at 1332). Moreover, in *High*, the union signed the original consent decree, but objected to a modification that the district court nonetheless approved. Thus, the court of appeals held that the modified decree was not one to which all parties to the litigation had agreed. By contrast, the agreement here was one which was concurred in by all parties to the litigation who had claims for relief or were subject to potential liability. Likewise, the court of appeals held in *High* that the remedial award embodied in the modification could not be imposed upon the union because the record supplied no basis for selecting those persons who were to receive relief under the modification. Here, unquestionably, the beneficiaries of the relief are persons who suffered because of TWA's discriminatory policy, and the relief merely restores them to the places they would have held but for the discrimination.

[31] Inasmuch as employers must regularly deal with their employees' collective bargaining representative, and will be sensitive to employee morale for reasons of self-interest, it is unlikely that employers will thoughtlessly bargain away seniority rights simply to settle litigation, as IFFA suggests. Moreover, the present case presents only the question of the propriety of approving a settlement that provides for rightful place seniority within the scheme of the existing collective bargaining agreement. No abrogation of rights under that agreement is involved.

promise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement" (slip op. 9 n.14). See also *Protective Committee* v. *Anderson*, 390 U.S. 414 (1968). This inquiry is designed not only to determine whether the proposed settlement is fair to class members who did not take part in developing the decree (see Fed. R. Civ. P. 23(e)), but also to permit the court to determine whether the decree fairly treats nonparties who also may be affected. See, *e.g.*, *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 616 F.2d 1006 (7th Cir. 1980); *Florida Trailer & Equipment Co.* v. *Deal*, *supra*, 284 F.2d at 573.

In Title VII litigation, the fairness hearing insures that a proposed consent decree, which restores seniority to members of the plaintiff class, will affect incumbents in only a fair and reasonable manner. Ordinarily, as here, the relief should preserve the established scheme of seniority rights and merely slot the victims of the alleged discrimination into their rightful place in that scheme.[32] The court's inquiry into the strength of the plaintiffs' case insures that the incumbents' seniority will be affected only when the plaintiffs' claims present a real prospect that full litigation would substantiate the alleged violation of Title VII.

At least two courts of appeals have held in similar circumstances, where the union has intervened only at the time of settlement, that an appropriate inquiry at the fairness hearing will adequately protect the interests of incumbents. In *Moore* v. *City of San Jose*, 615 F.2d 1265 (9th Cir. 1980), and *EEOC* v. *American Telephone & Telegraph Co.*, 419 F. Supp. 1022 (E.D. Pa. 1976), aff'd,

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[32] Here, each former employee received the seniority that she would have had but for TWA's implementation of its "no motherhood" policy (IFFA Pet. App. 21a). This Court has previously held that retroactive seniority such as this—"rightful place" relief—should "ordinarily" be awarded as an element of Title VII relief. See *Teamsters* v. *United States*, *supra*, 431 U.S. at 365; *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 772-773.

556 F.2d 167 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978), the courts, over union objections, approved settlements that provided seniority relief similar to that at issue here. In each case, the court examined the practices that were alleged to violate Title VII and found that the record evidence showed an apparent history of discrimination. In *Moore*, the court of appeals rejected the union's argument that the lower court's findings were insufficient to support relief affecting incumbents, stating (615 F.2d at 1271):

> The sole question before the district court in reviewing a settlement agreement is whether the agreement is fundamentally fair or just. * * * The inquiry of the district court should focus on the terms of the settlement, considering the merits only insofar as they are relevant in determining the probable outcome of the litigation, and thus give some indication of the fairness and justice of the settlement.
>
> Unless we can say that the district court abused its discretion in approving the Agreement, we will not overturn the district court's judgment. The findings of the district court were adequate to support a belief that were the matter fully litigated it is probable that plaintiffs would prevail and relief would be appropriate.

Here, the district court and the court of appeals followed these principles in approving the settlement.[33] The

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[33] IFFA contends (Br. 33) that the result below "is directly opposed" to *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977), cert. dismissed, 434 U.S. 801 (1978). In *Myers*, however, the unions were named as defendants from the outset, and their practices, as well as those of the employer, were alleged to be discriminatory (544 F.2d at 845). The consent decree that the plaintiffs and the employer independently negotiated altered "and superseded" provisions of the collective bargaining agreement, and the court of appeals held that the district court could not make "wholesale revisions" to a seniority system absent a finding that the agreement violated Title VII (*id.* at 855). However, the court of appeals specifically approved, despite the absence of union consent, one modification that was designed merely to achieve "rightful place" for the plaintiffs (*id.* at 858). Because

courts below had already determined that the plaintiffs' complaint had merit. Indeed, the district court had already granted summary judgment on liability, and that holding had been affirmed. In addition, the claims of Subclass A were unquestionably timely, and the claims of Subclass B were strengthened by the fact that the courts of appeals were divided, at the time of settlement, on the "jurisdictional" issue that the court of appeals had previously resolved against the plaintiffs, but which has not yet been resolved finally. See IFAA Pet. App. 7a-8a.[34]

Because the incumbent employees represented by IFFA are not entitled under the law to exclude victims of discrimination from being afforded their rightful place in the seniority scheme, IFFA should not be allowed to veto a settlement agreement reasonably designed to accomplish that result. IFFA was properly afforded a hearing on its objections, but it is for the court rather than IFFA itself to pass judgment on those objections.

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the theory upon which that relief was granted, however, was based on the "perpetuation" theory that this Court rejected in *Teamsters* v. *United States*, *supra*, the court of appeals (*Myers* v. *Gilman Paper Corp.*, 556 F.2d 758 (5th Cir. 1977)) later vacated this decision in light of *Teamsters*. Nonetheless, the relief that the court of appeals had previously approved in *Myers* is clearly consistent with the decisions below.

[34] The thrust of IFFA's argument (Br. 18-37) is that a court may never approve a settlement that affects seniority rights without the union's consent. Assuming both that the district court had jurisdiction and that the fairness hearing is a sufficient vehicle for protecting the incumbents' interests in circumstances such as those presented here, IFFA apparently has no other challenge to make. IFFA does not contest the court's determination of the overall fairness of the settlement, and, at all events, such a challenge would appear to be within the third question presented in IFFA's petition, with respect to which the Court has dismissed the writ as improvidently granted.

CONCLUSION

The judgment of the court of appeals should be affirmed in No. 80-951, and the judgment of the court of appeals should be reversed in No. 78-1545.

Respectfully submitted.

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